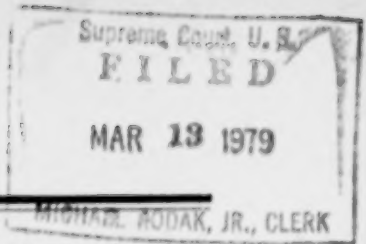


No. 78-1130



In the Supreme Court of the United States

OCTOBER TERM, 1978

PEDRO S. DeBORJA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

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Petitioner contends that the trial court's instructions, to which he did not object, impermissibly shifted to him the burden of proof on the issue of intent.

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on seventeen counts of mail fraud, in violation of 18 U.S.C. 1341 and 2.¹ He was sentenced to concurrent terms of four years' imprisonment and fined a total of \$17,000. The court of appeals affirmed (Pet. App. A1-A3).²

¹Petitioner was acquitted on six counts.

²The judgment of the court of appeals was entered on December 18, 1978. The petition for a writ of certiorari was not filed until January 18, 1979, and is therefore one day out of time under Rule 22(2) of the Rules of this Court.

1. The evidence showed that in 1972 and 1973, petitioner, a physician, participated in a scheme to defraud automobile insurance companies by submitting fraudulent personal injury claims. Pursuant to this scheme, attorneys referred automobile accident victims to petitioner, who, in turn, furnished the attorneys with false and fraudulent medical bills and reports that were then used to obtain inflated insurance settlements. Eleven of petitioner's patients testified that his bills reflected bogus or exaggerated injuries, various medical services that were not rendered,³ and substantially more office visits than actually occurred (Tr. 37-84, 125-179, 180-253, 261-358, 415-440, 549-577, 610-636, 671-713). Petitioner's records reflected office visits for days on which his office was closed as well as a visit from a patient on a day the patient was at sea (Tr. 759, 830, 1073, 1177-1179, 1197-1203, 1275-1277, 1297-1301). Petitioner's patients stated that they did not receive, or did not recall receiving, copies of his bills. Petitioner's secretary testified that petitioner had instructed her to indicate on each bill that a copy was made, but not to send the copy to the patient (Tr. 1317-1318). One of petitioner's patients testified that petitioner advised him to wear a neck brace because it would help his case (Tr. 130-131) and told him, "I'll make sure you get some money out of this" (Tr. 132).

Petitioner testified in his own defense that his patients were liars, that his medical records were authentic, and that each of the patients had received carbon copies of his bills.

2. At the conclusion of the evidence, the court instructed the jury, in pertinent part (Tr. 1404-1405):⁴

³Petitioner purported to have diagnosed and treated one patient's injuries although he had not even examined her (Tr. 671-713).

⁴A complete transcript of the jury instructions is appended to the petition (Pet. App. A4-A37).

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the Jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Petitioner did not object to this instruction at trial. He now contends, however, that the instruction constituted plain error that shifted to the defendant the burden of proof on the issue of intent and thus failed to require the prosecution to prove intent beyond a reasonable doubt.⁵

The court of appeals (Pet. App. A2-A3) joined other circuits in indicating that district courts should avoid using language in jury instructions that might be construed as shifting to the accused the burden of proof.⁶

⁵Since petitioner presented evidence at trial, it is possible that he hoped to benefit from the portion of the charge that states that the inference of intent should not be drawn if "the contrary appears from the evidence * * *." It is thus questionable whether the claimed error adversely affected petitioner's substantial rights so as to be preserved without objection or was, instead, the result of counsel's tactical trial choices.

⁶The court of appeals suggested (Pet. App. A2) that district courts should use the following charge from 1 Devitt & Blackmar, *Federal Jury Practice Instructions* §14.13 (3d ed. 1977):

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

See, e.g., *United States v. Garrett*, 574 F. 2d 778, 782-783 (3d Cir. 1978); *United States v. Chiantese*, 560 F. 2d 1244, 1256 (5th Cir. 1977) (*en banc*); *United States v. Bertolotti*, 529 F. 2d 149, 159 (2d Cir. 1975). The court of appeals correctly held (Pet. App. 2a), however, that even if the challenged instruction in isolation was improper, reversal is not required because "the jury was not misled by the charge." See *United States v. Eaglin*, 571 F. 2d 1069, 1076 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978); *United States v. Roberts*, 546 F. 2d 596, 598-599 (5th Cir.), cert. denied, 431 U.S. 968 (1977); *United States v. Denton*, 336 F. 2d 785, 788 (6th Cir. 1964).

As this Court stated in *United States v. Park*, 421 U.S. 658, 674 (1975), quoting *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973), "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." In this case, the jury was carefully instructed on the government's burden of proving each element of the offense charged beyond a reasonable doubt (Tr. 1387) and told that it should "always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence" (Tr. 1387, 1393). The court repeatedly emphasized the nature of the government's burden (Tr. 1385, 1388, 1413-1414) and properly and carefully described the offense with which petitioner was charged and the elements of the offense (Tr. 1395-1403). The court also instructed the jury that fraudulent intent "is not presumed or assumed" (Tr. 1403), that the burden is always upon the prosecution to prove intent beyond a reasonable doubt (Tr. 1404), and that intent may be inferred from the "surrounding circumstances," including any statement or act of the defendant and "all other facts and circumstances in evidence which indicate * * * his state of mind" (Tr. 1407). And the court reminded the jury that "specific intent must be proved beyond reasonable doubt before there can be a conviction" (Tr. 1406).

The particular language to which petitioner objects comprised only a small part of the instruction. "It seems highly improbable that the jury would pick out and focus its attention on one particular clause and abstract the notion that the defendant had the burden of proof * * *." *United States v. Wilkins*, 385 F. 2d 465, 473-474 (4th Cir. 1967), cert. denied, 390 U.S. 951 (1968). When considered as a whole, the instruction "correctly stated the law with sufficient clarity as not to be misleading."⁷ *Imholte v. United States*, 226 F. 2d 585, 591 (8th Cir. 1955).

In any event, as the court of appeals observed (Pet. App. A2), the only issue presented at trial was the credibility of the testimony that petitioner had prepared and transmitted false insurance claims. Petitioner did not claim at trial (nor could it reasonably have been claimed)

⁷Contrary to petitioner's contention (Pet. 33), it is of no moment that, at the jury's request, the trial court repeated its instructions on reasonable doubt and intent (Tr. 1430-1437). See *United States v. Wilkins*, *supra*, 385 F. 2d at 474. The court cautioned the jury that "the other instructions are equally important" and that it was "to consider the instructions as a whole" (Tr. 1430).

Moreover, petitioner mistakenly relies (Pet. 25-26) on *United States v. Pope*, 561 F. 2d 663 (6th Cir. 1977), *United States v. Chiantese*, 560 F. 2d 1244 (5th Cir. 1977) (*en banc*), and *United States v. Alston*, 551 F. 2d 315 (D.C. Cir. 1976), for the proposition that the claimed error of the challenged instruction was not cured in the context of the entire charge. *Pope* held only that general instructions on intent cannot cure the *absence* of an instruction on the specific intent requirement (there "intent to distribute") that is an element of the offense. 561 F. 2d at 670-671. In *Chiantese*, the court held that, in the exercise of its supervisory power, it would prospectively refuse to consider whether general burden of proof instructions cure a charge that improperly shifts the burden of proof to the defendant. 560 F. 2d at 1255. The court applied its decision prospectively only; its holding was based largely on concerns of judicial efficiency rather than on constitutional considerations. 560 F. 2d at 1256. Finally, the decision in *Alston* reflects the court's awareness that the invalidity of a jury instruction must be evaluated in the context of the entire charge. 551 F. 2d at 318-319. In this regard, *Alston* thus supports our submission in this case.

that, even though he may have submitted false insurance claims, he nonetheless did so without any intent to defraud. Thus, here as in *Helms v. United States*, 340 F. 2d 15 (5th Cir. 1964), cert. denied, 382 U.S. 814 (1965), and *United States v. Durham*, 512 F. 2d 1281 (5th Cir.), cert. denied, 423 U.S. 871 (1975), the question of intent was not a genuine issue at trial and the claimed error in the intent instruction was immaterial. In view of the overwhelming evidence of petitioner's guilt, the claimed error in the trial court's instruction on intent—far from being plain error requiring automatic reversal—was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969); *United States v. Durham, supra*, 512 F. 2d at 1288.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.⁸

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

⁸In *Sandstrom v. Montana*, cert. granted, No 78-5384 (January 8, 1979), the Court has agreed to decide whether the trial court's instruction to the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts" deprived the defendant of due process. In that case, the defendant was charged with "deliberate homicide" based primarily upon his confession. The defense rested upon the theory that the defendant had not acted with the requisite intent. 580 P. 2d 106, 107-108 (1978). Here, however, petitioner's intent was not a real issue at trial. Moreover, the charge in this case did not purport to establish any presumption as to the defendant's intent and the charge, considered in its entirety, did not shift to the defendant any element of the burden of proof.